Supreme Court of the United States

OCTOBER TERM, 1939.

No. 243.

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

—against—

F. W. FITCH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the Board of Tax Appeals (R. 10) is not reported.

The opinion of the Circuit Court of Appeals (R. 66) is reported in 103 F. (2d) 702.

Jurisdiction.

The decree of the Circuit Court of Appeals (R. 71) was entered April 29, 1939.

Petition for certiorari was filed July 29, 1939, and granted October 9, 1939.

The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

(a) A question is whether payments made to respondent's divorced wife from the income of an irrevocable trust created by him on separation and taken into consideration upon a final settlement of all financial obligations to her made later when a divorce took place, should be included in his taxable income, where, after the divorce, there was no continuing obligation on him to support his former wife, and neither by contract nor the law of the state of domicile was there any obligation on him to make good or supplement the trust income, or any power in the courts to revise the property settlement because of changed conditions. Stated in another way, the question is whether, under the conditions stated, the trust income paid to the divorced wife is distributed for the benefit of the divorced husband, and is constructively his.

(b) The question also arises as to what the Iowa law is, and whether under it there was, after the divorce, a continuing obligation on the respondent to support his divorced wife.

Statutes Involved.

Sections 161, 162, 166 and 167 of the Revenue Act of 1932 (c. 209, 47 Stat. 169), relating to the income of trusts, are set forth in the Appendix to this brief (p. 35).

Statement.

This case involves the respondent's Federal income tax for 1933, and the propriety of the action of the

Commissioner of Internal Revenue in requiring respondent to include in his taxable income the amount received in 1933 by his divorced wife out of the income of an irrevocable trust created by him for her benefit on separation prior to divorce, and taken into consideration when making a final property settlement at the time of the divorce.

The facts were stipulated (R. 19-61).

The respondent was married in 1892. In 1917 he and his wife, Lettie S. Fitch, separated and thereafter lived apart (R. 19). In 1919 he purchased a home for his wife at a cost of about $5,000, and furnished it (R. 19). In December, 1922, the wife brought suit in Iowa for separate maintenance (R. 19). As a result of negotiations respondent then created a trust for her benefit (R. 20). Under the trust agreement, dated April 23, 1923 (R. 35), he conveyed to the trustee a factory building and land, which had previously been leased for ninety-nine years to the F. W. Fitch Co., a corporation, at an annual rental of $12,000 (R. 25). He also transferred to the trustee the lease, with right to collect the rents (R. 35).

The trust deed provided that of the income from the trust estate the wife should receive $600 per month so long as she lived. The net income above $600 per month was to be paid to the respondent as long as he lived. On the death of either respondent or his wife, the deceased's share of the income was to be paid to their children. On the death of both, and after the expiration of fifteen years, the principal was to be paid over to the children (R. 35).

The trust was irrevocable. The husband reserved no interest in either the principal or income of the trust estate, except the income in excess of $7,200 per

year for his life. He did not agree to make good any deficiency in the income of the trust, nor obligate himself in any other way to assure her $600 per month (R. 35). As a result of this settlement, the suit for separate maintenance was dismissed without prejudice (R. 20).

The terms of the trust agreement have been complied with by all parties concerned (R. 20).

In April, 1925, the wife filed suit in an Iowa court, for divorce and for a share of her husband's estate, and in December, 1925, a decree of absolute divorce was entered (R. 59). The property affairs of the parties were settled by agreement. Consideration was given to the provision theretofore made by the respondent for his wife, including the trust, and he agreed to supplement that by transferring to his wife shares of stock of the book value of $77,959.80, and to pay to her in cash the sum of $23,500, of which $15,000 was to cover her legal and other expenses, and $8,500 was to be retained by her (R. 20, 59).

This arrangement was intended as a final and absolute settlement of all claims for dower, alimony or maintenance. The property settlement was submitted to the court and its decree states (R. 59, 60):

> "It appearing to the court that the parties, Lettie S. Fitch and Fred W. Fitch, have entered into an agreement of settlement of all of their property matters and alimony without the aid of the court, and that the agreement has been performed and division of the property and provisions for alimony made in accordance therewith; * * * the court * * * finds that the plaintiff * * * is entitled to an absolute divorce, and is entitled to the property and alimony settlement.
>
> It is, Therefore, Ordered, Adjudged and De-

> creed, that the plaintiff, Lettie S. Fitch, be, and she is hereby, divorced from the defendant, Fred W. Fitch, absolutely; * * * that the trust agreement * * * be, and the same is hereby ratified and confirmed by the court; and that the property and alimony settlement made by the parties be, and it is hereby confirmed by the court."

The domicile of the parties has at all times been in the State of Iowa (R. 19).

The court by its decree thus confirmed "a settlement of all their property matters and alimony" (R. 59) which discharged the husband from all liability to his wife.

In 1933 the trustee paid out of the income of the trust estate, in accordance with the terms of the trust agreement, to Lettie S. Fitch $7,128 (being $7,200 less the commissions of the trustee), and to the respondent $4,752 (R. 21). In his return for that year he included as taxable income the $4,752, which he had received, but not the amount paid to his former wife (R. 21).

The Commissioner determined that he should have included as his income the amount paid by the trustee to his former wife, and charged him with a deficiency of $1,555.58 (R. 6, 10).

The Board of Tax Appeals affirmed the action of the Commissioner (R. 13).

The Circuit Court of Appeals reversed, holding that the income of the trust paid to the divorced wife was not chargeable to him; that neither by agreement nor by Iowa law was there any obligation on respondent, continuing after the divorce, to support his former wife, and therefore the trust income paid to the divorced wife was not paid for the benefit of

the respondent, and the payment of income did not operate to relieve him from or satisfy any obligation to which he was then subject; that the settlement and transfers made before and at the time of the divorce, not the subsequent payment of trust income, extinguished any obligation on his part.

Summary of Argument.

I. There was no continuing obligation on the divorced husband to support his former wife.

When the divorce was granted, by agreement confirmed by court decree the husband was finally discharged from liability. The income thereafter earned by the trust and paid to the divorced wife did not reduce or relieve him from any existing liability, nor benefit him in any way. It was not constructively his.

II. In *Douglas* v. *Willcuts*, 296 U. S. 1, the divorced husband bound himself by agreement to secure to his divorced wife a stated income for her life. The trust was merely security for this obligation. Under local law the courts also had continuing power to revise the settlement. Because of these conditions the Court held that the trust income, applied annually to relieve the husband from a continuing liability, was used for his benefit, and constructively his. The principle applies to any case where the grantor creates a trust, the income of which is to be applied to discharge his obligations. The other decisions of this Court follow the same principle.

The decisions of the Circuit Courts of Appeals are in line with this view. The courts of the Second, Sixth and Eighth Circuits have adopted these prin-

ciples and so interpreted *Douglas* v. *Willcuts*. There is no decision to the contrary in any other circuit.

The Board of Tax Appeals has wobbled some, but the majority of its decisions are in accord with these principles.

III. Neither by contract nor local law was there any continuing liability on the husband for the wife's support after the settlement and divorce. The husband did not guarantee the amount of the wife's income, or agree to make up deficiencies, nor did he reserve any interest or reversion in the corpus. The property settlement was final. The divorce court accepted it and confirmed it as such and under the decisions of the Supreme Court of Iowa, the decree constituted a final adjudication of all property and marital rights and obligations between the parties and no court could thereafter modify or revive it.

There is no law in Iowa prohibiting divorced husband and wife from binding themselves by a property settlement, nor any law or decision which would give a divorce court power to later revise a settlement agreed on and confirmed as final. Furthermore, the decree confirming what amounted to a final discharge of liability, even if it had not conformed to Iowa law would have been at most erroneous, not void, and binds the parties, and the Government, on the point that liability was then terminated.

Argument.

I.

There being no continuing obligation on the divorced husband to support his former wife, the income of the trust was not paid for his benefit, and was not taxable to him.

The Revenue Acts expressly provide a plan for the taxation of the income of trust estates. The provisions of the Revenue Act of 1932, here controlling, governing the taxation of trust income (this Brief, pp. 35-38) establish the general rule that income accumulated by the trustee shall be taxable to the trust as an entity, and income distributed shall be taxed to the person to whom distributed. There are statutory exceptions, not here material, as in Section 166 of the 1932 Act, that the income of a revocable trust shall be taxed to the grantor, and as in Section 167 that income accumulated for the grantor shall be taxed to him.

There is no provision of the Act of 1932, or in any other Revenue Act, specifically dealing with so-called "alimony trusts".

Douglas v. *Willcuts*, 296 U. S. 1, dealt with such a case. In that case the liability of the divorced husband was not extinguished by the divorce, or by the creation of the trust. His continuing liability rested on three grounds:

(1) His express agreement that if the trust income should fall below $15,000 in any year, he would make up the deficiency.

(2) The provision of the divorce decree which confirmed that liability; and

(3) The law of Minnesota which continued his liability for the support of his divorced wife, and gave the courts power to revise the decree and trust agreement to that end.

The trust agreement also provided that the trust estate should revert to him on the wife's death. The trust was in substance merely security for his continuing obligation to provide her with an annual income of $15,000.

The principle there established was that if there is a continuing obligation of the trust grantor to the divorced wife and the trust income is used from time to time to satisfy *pro tanto* that obligation, the income is constructively the grantor's. The principle is sound because otherwise one could evade income taxes by the device of creating trusts with direction to apply the income to pay his obligations.

The opinion in *Douglas* v. *Willcuts* is clear. It merely applied the general doctrine of constructive receipt. See *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716; *United States* v. *Boston & Maine Railroad*, 279 U. S. 732; *Lucas* v. *Earl*, 281 U. S. 111.

The principle it announced is not confined to trusts established to satisfy obligations arising from domestic relations. It applies to any case where the grantor has continuing obligations, and establishes a trust, the income of which is to be applied to their discharge. It is immaterial whether the continuing obligation is to support a divorced wife, or is a debt owing to a bank.

The essential inquiry is whether there is any existing and continuing obligation of the grantor to which

the income is applied. A continuing obligation on a divorced husband to provide for his former wife may result from a decree for periodic payments of alimony, or from contract, such as an agreement by which he remains liable to provide her income in a stated amount, or from statutes of the domicile, as in states where there are laws which expressly provide that a man remains liable for the support of his wife even after divorce, and that all contracts for support and property settlement between divorcees shall be subject to revision if conditions change, and that divorce courts have power later to revise any decree made at the time of divorce, so as to require the husband to support his former wife adequately.

The mistake of the Bureau of Internal Revenue in this case is in failing to recognize this fundamental principle, and in assuming that the income of any trust created on divorce by the husband for the wife is taxable to him merely because the trust was created in settlement of liability for alimony or support.

In this case the Commissioner said:

> "You are advised that the Bureau holds that income from a trust created in lieu of alimony is taxable to the husband, the grantor, for the reason that *the income of the trust* was used for the discharge of the grantor's personal and marital obligations" (R. 7). (Italics ours.)

The fallacy is in the statement that the *income* was used to satisfy an obligation of the respondent. There was no obligation on the grantor when the income was earned or distributed. The payment of income to the wife did not discharge any obligation of his or operate to his benefit. It was legally and financially a matter of indifference to him whether

there was any trust income for the divorced wife. All obligation on his part was terminated at the time of the divorce. Even if the trust had been created at the time of divorce and as part of the settlement, it would have been *the creation* of the trust and the transfer of the capital fund to the trustee which would have extinguished the liability, not the subsequent distribution of the income.

One peculiarity of this case is that the trust was not created at the time of the divorce in settlement of alimony. It was created in 1923 and was irrevocable, and was merely taken into consideration in 1925 in determining what provision should then be made for the wife. It was actually the payment of the lump sum and transfer of shares of stock in 1925 which was the consideration for the agreement, confirmed by decree, which the court below described as having discharged forever all liability of the husband to provide for the wife (R. 59). But even where a trust is created to settle obligations to the divorced wife, if there is no continuing liability, the subsequent income is no more used for the husband's benefit or taxable to him, than is the income derived by the wife from money or property transferred to her absolutely in settlement of her claims.

The mere circumstance that the provision which a man has made for his wife through the creation of a trust was subsequently confirmed in a decree of the divorce court, and therefore can be called alimony, is not controlling. If the decree has subjected him to some obligation, the question remains as to the nature of that obligation and whether it was satisfied by the creation of the trust or has remained as a continuing obligation to be discharged by the periodic

distribution of trust income. Alimony, or provision in lieu of alimony, may be decreed in a lump sum, or may consist of an irrevocable life estate in a trust fund. If so, the life estate is the capital sum transferred to the wife in satisfaction of her marital rights; she becomes the owner of such estate, the income of which is her income. She is not merely an assignee of future income of the husband to be derived from his property. *Cf. Helvering* v. *Butterworth*, 290 U. S. 365; *Helvering* v. *Pardee*, 290 U. S. 365, *loc. cit.* 370; *Blair* v. *Commissioner*, 300 U. S. 5. Those cases are consistent with and support our contention here.

There is no more reason to tax the respondent on the income of this trust, than to tax him on the income the divorced wife may obtain from the shares of stock and cash transferred to her in settlement of her claims.

The Government urges the adoption of some new theory for the taxation of the trust income to the respondent, even in the absence of a continuing legal obligation, and relies on *Burnet* v. *Wells*, 289 U. S. 670. In that case this Court upheld, over a strong dissent, the constitutionality of a special provision of the statute expressly taxing a trust grantor on trust income used to pay premiums on policies of insurance on his life. There is no express provision of the statute relating to taxation of so-called alimony trusts. The Government is here asking this Court, not to uphold the statutory scheme for the taxation of trust income, but to create an exception to it.

II.

The decisions of the courts support the respondent's position.

(a) Decisions of this Court.

Douglas v. Willcuts, 296 U. S. 1, referred to above, is the leading case. The principle it announced is clear. In that case the liability of the husband was not ended by the divorce or by the creation of the trust. The husband agreed that if the trust income fell below $15,000 in any year, he would make good the deficiency, and by the law of Minnesota any settlement made at the time of divorce was subject to revision. The trust deed in that case provided that on the wife's death the trust estate should be returned to the husband. In substance, there was a promise by the husband to pay or cause to be paid to the wife $15,000 per year so long as she lived. The trust merely created a fund to secure that obligation, and upon the accomplishment of that purpose the fund was to be returned intact to the husband. *Cf. DuPont v. Commissioner*, 289 U. S. 685. Each year as the income of the trust was paid to the wife, the payment operated to relieve the husband from liability *pro tanto* and thus operated to his financial and legal benefit. The Court, referring to the statutory provisions for payment of the tax by the recipient of the income, said (p. 10):

> "These provisions have appropriate reference to cases where the income of the trust is no longer to be regarded as that of the settlor, and we find no warrant for a construction which would pro-

clude the laying of the tax against the one who through the discharge of his obligation enjoys the benefit of the income as though he had personally received it."

In *Helvering* v. *Stokes*, 296 U. S. 551, the Court held for the Commissioner and reversed, *per curiam*, on the authority of *Douglas* v. *Willcuts*. There the taxpayer had created a trust, the income to be paid to his minor children, and the legal obligation to support them continued, and the annual application of the income to their use relieved him of his obligation. (See 79 F. (2d) 256.)

In *Helvering* v. *Schweitzer*, 296 U. S. 551, decided *per curiam* for the Commissioner on the authority of *Douglas* v. *Willcuts*, a father had created a trust, the income to be paid to him to be used for the support of his minor children. Obviously, his liability for support was a continuing one, and each application of the income relieved him *pro tanto* from his obligation. (See 75 F. (2d) 702.)

In *Helvering* v. *Lucy Bachenthal*, 296 U. S. 552, decided for the Commissioner *per curiam*, a woman created a trust, the income of which was required to be and was applied to pay the amount owing on a note she had given her bank and on which she remained liable. (See 76 F. (2d) 507.)

In *Helvering* v. *Coxey*, 297 U. S. 694, decided for the Commissioner *per curiam* on the authority of *Douglas* v. *Willcuts* and the three other cases last above cited, the husband, being entitled to the income of a trust, assigned out of that income $8,400 per

she agreed to make no further demands for support for herself or their two minor children. Afterwards a divorce was granted by a decree, which made no provision for alimony. The agreement provided that as each child attained the age of twenty-three years the wife would assign to it $3,000 per year of the income. The husband was held liable for the tax on income paid to the wife during the minority of the children. The income was intended in large part for the support of minor children, for which there was a continuing liability on him, until they attained majority, and, as the Government's petition for certiorari (p. 6) pointed out, the law of New Jersey (the domicile) left on him an obligation to support his wife after divorce and despite the agreement. The assigned income paid the wife from time to time thus operated to satisfy his continuing liability to support his divorced wife and minor children.

These cases are consistent with our position. We know of no other decisions of this Court since *Douglas* v. *Willcuts* bearing directly on the subject.

(b) Decisions of Circuit Courts of Appeals.

In the Circuit Courts of Appeals the subject has frequently arisen.

Three of the Circuits now definitely agree with our position, the Sixth Circuit in *Commissioner* v. *Tuttle*, 89 F. (2d) 112, the Eighth Circuit in this case, and the Second Circuit in *Harry Blumenthal* v. *Commissioner*, 91 F. (2d) 1009 (a *per curiam* affirmance of the Board of Tax Appeals), and in *Leonard* v. *Helvering*, 105 F. (2d) 900, and *Fuller* v. *Helvering*, 105 F. (2d) 903, both decided June 30, 1939.

In the *Tuttle* case the husband had not assumed any continuing obligation to the divorced wife in the trust deed or otherwise, the divorce decree had not imposed any such obligation, and under the law of the domicile the courts had no power to revise the settlement or impose any further burden on the husband. The court held that the income of the trust was not taxable to the husband, distinguishing *Douglas v. Willcuts*, because it dealt with a case of continuing liability and involved a situation where the trust income was applied for the benefit of the grantor.

In the *Harry Blumenthal* case, the underlying principle of the *Tuttle* case was followed by the Second Circuit. The Board of Tax Appeals had held that a divorced husband was not taxable on the income of a trust distributed to his divorced wife after her remarriage, where it appeared that he had not, by contract or otherwise, assumed any obligation to guarantee the income of the trust or otherwise assure her of a stated income. The Circuit Court of Appeals affirmed the Board in a *per curiam* decision.

The *Leonard* and *Fuller* cases, just decided in the Second Circuit, follow the decisions in the Sixth and Eighth Circuits, and adopt the principle that if a liability of the husband for the wife's support does not continue after the trust is made, the trust income is not constructively his.

In an earlier decision, in *Helvering* v. *Brooks*, 82 F. (2d) 173, the Second Circuit held the husband taxable on the trust income. There the trust deed provided for payment of annual income of $12,000

to the divorced wife, and although the husband did not contract to make good any deficiency, under the law of the domicile (Florida) he remained liable for the adequate support of his divorced wife, and the Florida courts had jurisdiction to revise the arrangement by supplementary decree on the application of either party. This feature of the *Brooks* case was stressed in the Government's brief.[1] That brief stated that the trust was merely collateral security to the husband's obligation for support. Moreover, in the *Brooks* case the trust income was distributable to the grantor after the wife's death and the corpus of the trust was to revert to the grantor's estate on death of both husband and wife.

This situation justified the decision in the *Brooks* case, although the Court of the Second Circuit states in the *Leonard* decision that it did not base the decision on the principle it finally adopted in the *Leonard* and *Fuller* cases.

There is no decision of any Circuit Court of Appeals against our view of the law. Although in a number of cases in other circuits it has been held that the income of a trust created for the benefit of a divorced wife was taxable to her former husband, none of the decisions is in conflict with the rule recognized in the Second, Sixth and Eighth Circuits. All the decisions in all Circuits seem to agree in principle that if after the divorce neither contract

[1] At page 8 of the Government's brief in that case it was stated:

> "The husband's obligation to support his wife is a continuing obligation and the amounts to be paid to the wife under any agreement or decree may be increased or decreased from time to time as justice and equity may require. General Laws of Florida (1935), C. 16780."

nor local law leaves the husband subject to a continuing liability for his former wife's support during the tax year, the income of an irrevocable trust he has established for her is not constructively his, is not applied for his benefit and, therefore, is not taxable to him.

Decisions in the Third and Seventh Circuits, in which the divorced husband was held taxable on the trust income, were explained by the Department of Justice, in successfully opposing certiorari, as resting on the continuing legal obligation of the trust grantor to his wife during the tax year, and cases in which no such continuing liability existed were expressly distinguished.

Thus, in *Alsop* v. *Commissioner*, 92 F. (2d) 148, certiorari denied 302 U. S. 767, in the Third Circuit, the grantor remained liable to his divorced wife during the tax year by reason of his express agreement to make up deficiencies in the trust income so as to assure her a stated income. The Court of Appeals held that the divorced husband was taxable on the income, and he applied for certiorari. That Government counsel were then disposed to accept the *Tuttle* decision as sound is indicated by their brief in opposition to certiorari, where it is said (p. 9):

> "Petitioner relies on *Commissioner* v. *Tuttle*, 89 F. (2d) 112 (C. C. A. 6th), as creating a conflict with the decision of the court below in the instant case (Pet. 5, Br. 10-11). That case, however, is clearly distinguishable. The court there stated (p. 113) that the problem presented 'a somewhat different aspect from [that] considered in' the *Douglas* case and required 'consideration of local law not controlling in' that

case. Moreover, the court there pointed out that under Michigan law the settlement did not constitute alimony but was analogous to a lump sum property settlement; that the decree adjudged that the settlement agreement was 'in full satisfaction and settlement of any and all dower or dower rights and nothing more' (p. 115); and that, under the absolute transfer, there remained no continuing obligation on the part of the taxpayer for support and maintenance or debt to be paid out of his income, either actually or constructively. The court stresses the fact (pp. 115-116) that deficiencies in the annual income to the wife from the trust were not to be made up by the taxpayer, and any excess over the required annual payments to her was not to be paid to him. These distinctions serve to negative the contention that a conflict exists. Moreover, it has not been shown herein that the law governing the present agreement operates to effect a different result from that in the *Douglas* case, as the Michigan law was deemed to do in the *Tuttle* case."

In *Donnelley* v. *Commissioner*, 101 F. (2d) 879, certiorari denied, 59 S. Ct. 1043, in the Seventh Circuit, the divorced husband had assigned to his former wife $30,000 per annum out of the income of a trust created by another for his benefit, and had agreed that if in any year the trust income so assigned to her should fall below $30,000 he would make up the deficiency. The Seventh Circuit, affirming the Board of Tax Appeals, held that the trust income was used to discharge his obligations to his former wife and that such income was, therefore, taxable to him. In opposing the petition for certiorari in that case, Gov-

the *Tuttle* case "on the ground that the application of the income in question in those cases arose from an outright transfer of property or income, with no obligation to maintain future payments of income, and thus was not in discharge of a continuing obligation of the taxpayer as in the present case."

In all other cases in which the divorced husband has been held taxable, it has appeared that he was under an existing legal obligation to his former wife during the tax year, which obligation was discharged *pro tanto* by the trust income distributed to her during that year.

In *Commissioner* v. *Hyde*, 82 F. (2d) 174 (C. C. A. 2) and *Glendinning* v. *Commissioner*, 97 F. (2d) 51 (C. C. A. 3), the grantors remained under a continuing liability because of their express agreements to make up deficiencies in the trust income.

In the *Glendinning* case (and also in the *Alsop* case), although the former wives had remarried, a fact which would ordinarily have ended the obligations of the first husband, they continued to be liable because their guaranty of fixed incomes to their divorced wives was not conditioned on the latter remaining single.

In *Thomas* v. *Commissioner*, 100 F. (2d) 408, decided by the Second Circuit on December 5, 1938, the divorced husband had set up a trust to pay the net income to his former wife for life. He had contracted with her to pay her a fixed amount per annum "so long as they both shall live", such amount to be reduced by the amount of trust income received by her. By virtue of this contract, he remained legally

obligated to her and such obligation was satisfied *pro tanto*, from time to time, by the distribution of trust income to her. Moreover, the matrimonial domicile of the parties was Florida, in which state the divorce was secured and, under the law of Florida, Thomas remained liable for the support of his former wife, despite the provision of the divorce decree or any agreement to the contrary, all of which the divorce court had the power to modify at any time on application of either party. It was clear, therefore, and was conceded by both parties, that so long as Thomas lived the trust income was taxable to him. Thomas having died in 1926, the question in the case was whether the trust income for 1930 was taxable to Thomas' estate or to his former wife.

The Board had held that the trust income after Thomas' death was taxable to his former wife, basing its decision squarely on the proposition that the *Douglas* case was not applicable since all liability of Thomas to his wife had ceased upon his death (Commerce Clearing House B. T. A. Service, Dec. No. 9950-A). The Second Circuit affirmed unanimously. Although the court did not base its affirmance squarely on the fact that Thomas' liability had ended prior to the tax year, the majority of the court referred to their own decision in the *Harry Blumenthal* case as authority for such a holding, and intimated that they would have based the affirmance on that ground had it not been for their assumption that "the opposite result was reached" by the Third Circuit in the *Glendinning* case. The Court's assumption as to the *Glendinning* case was incorrect; we already have shown that there is no conflict between the *Glendinning* case and the *Harry Blumenthal* case, but that the two cases are distinguishable on their facts, since in

the *Harry Blumenthal* case the taxpayer's liability to support his former wife did actually cease upon her remarriage whereas in the *Glendinning* case the taxpayer's liability did not cease upon his former wife's remarriage because he had contractually obligated himself to pay her fixed annual amounts so long as she should live.

(c) Decisions of the Board of Tax Appeals.

The Board of Tax Appeals has not been as consistent as the Courts.

Prior to this Court's decision in *Douglas* v. *Willcuts*, the Board of Tax Appeals laid down the correct rule in a number of decisions, distinguishing between trusts under which the divorced wife was nothing but a life beneficiary entitled to trust income and cases in which the husband remained legally obligated to her in a fixed amount per annum or in gross and the trust was created merely as security for the performance of that continuing obligation.[2]

Since the decision in *Douglas* v. *Willcuts*, the Board has held the divorced husband taxable on the income of a trust created for the benefit of his former wife in a number of cases, in some of which the husband was under a continuing obligation to pay his wife a stated amount per annum,[3] and in others of which the husband remained liable, under the statutes of the domicile, to support his former wife even after

[2] *Welch* v. *Commissioner*, 12 B. T. A. 890; *Lynch* v. *Commissioner*, 23 B. T. A. 435; *Turner* v. *Commissioner*, 28 B. T. A. 91, aff'd *per curiam* 71 F. (2d) 1018 (C. C. A. 2); *Longyear* v. *Commissioner*, 28 B. T. A. 1086, aff'd 77 F. (2d) 116 (D. C. Ct. App.).

[3] *Tillar* v. *Commissioner*, 38 B. T. A. 545; *Weir* v. *Commis-*

divorce.[4] In the *Tuttle*, *Harry Blumenthal* and *Thomas* cases, referred to above, and in other cases,[5] the Board has held the divorced husband not taxable on the trust income, where it appeared that under the agreement with his former wife his liability to her had been cut off, prior to the tax year, by the divorce, the wife's remarriage, or the husband's death.

On the other hand, in the instant case, in the *Leonard* and *Fuller* cases, referred to above, in *Hogan* v. *Commissioner*, 35 B. T. A. 26, *Higginson* v. *Commissioner* (unreported—C. C. H. Dec. No. 10546-D), *Nichols* v. *Commissioner* (unreported—C. C. H. Dec. No. 10739-D) and *Metcalf* v. *Commissioner*, 40 B. T. A. 177 (on appeal to C. C. A. 2), the Board held the husband taxable, although all liability to his former wife had been terminated prior to the tax year, apparently on the ground that he had been liable to support his wife before divorce and might have been subjected to an obligation for alimony if he had not created the trust.

III.

After the divorce, there remained no continuing liability on the husband for support, either by contract or by decree or by Iowa law.

The parties intended the settlement and lump sum payments agreed on at the time of the divorce to

[4] *Whitaker* v. *Commissioner*, 33 B. T. A. 865 and *Goldring* v. *Commissioner*, 36 B. T. A. 779.

[5] *Rea* v. *Commissioner*, 35 B. T. A. 1132 and *Barry* v. *Commissioner*, an unreported memorandum decision published in Commerce Clearing House Board of Tax Appeals Service as Dec. No. 8751-L. See also *Hall* v. *Commissioner*, 75 F. (2d)

settle finally all obligations of the husband for alimony or for the wife's support. The decree confirming the arrangement so characterizes it and in effect is an adjudication that his liability is at an end. There was no covenant of the husband in effect during the tax year guaranteeing the amount of the trust income payable to the divorced wife.

It only remains to inquire whether it was competent under Iowa law to make such a settlement, and whether under Iowa law there remained any power in the courts to revise the arrangement and compel the respondent to provide support. Iowa has no statute such as is found in some jurisdictions providing that a man is legally obligated to support his wife even after divorce and that any agreement between divorced husband and wife for her support is always subject to revision by the courts.

In the absence of such a statute, it is not against public policy for husband and wife to make such final settlements by agreement. Such adjustment of property rights by agreement rather than litigation is favored. *Chambers* v. *Porter*, 183 N. W. 431 (Iowa, not officially reported); *Coole* v. *Coole*, 114 Kan. 605; *Burnett* v. *Paine*, 62 Me. 122; *Palmer* v. *Fagerlin*, 133 Mich. 345.

Under the statutes and decisions of Iowa no power remained in its courts to revise this settlement, or require the husband to make any further contribution. Furthermore, the decree in the divorce case is in effect an adjudication binding on the parties that the husband is forever discharged. Even if there were laws in Iowa to the effect that the husband should not be finally discharged from liability, the

decree would nevertheless be binding on the parties. In that case it might have been erroneous, but not void. *Fender* v. *Helvering*, 291 U. S. 35; *Blair* v. *Commissioner*, 300 U. S. 5, citing with approval *Hubbell* v. *Helvering*, 70 F. (2d) 668 (C. C. A. 8th).

The statute of Iowa reserving jurisdiction to divorce courts to make subsequent changes in their orders relating to children, property, parties and maintenance, relates to orders which are of a nature not final.

Where there is a final division of property and an agreement intended as a complete discharge of the husband's obligations and confirmed as such by the court, there is no power in the courts thereafter to alter it. The Circuit Court of Appeals reviewed the Iowa law and reached that conclusion, and its conclusion as to local law carries weight. *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55, 74.

The Code of Iowa contains the following provision with reference to alimony, custody of children and subsequent changes:

> "Sec. 10481. **Alimony-custody of children-changes.** When a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be right.
>
> Subsequent changes may be made by it in these respects when circumstances render them expedient. [C51, Sec. 1485; R60, Sec. 2537; C73, Sec. 2229; C97, Sec. 3180; C24, 27, 31, Sec. 10481.]"

The foregoing provision has always been in the statutory law of Iowa. It was first adopted in its present form in the Iowa Code of 1851. Even before

statehood, the Iowa Territorial legislature had adopted a similar provision, at its first session, 1838-39. The provision has been the subject of an abundance of judicial interpretation and discussion by the Iowa Supreme Court and there is not the slightest doubt concerning its meaning and effect.

The Supreme Court of Iowa has held repeatedly that this provision does not, upon divorce, preclude final adjudications between a husband and wife respecting their property. It is only when minor children are involved or an order has been made requiring the husband to make future payments to support the wife that subsequent changes in the divorce decree can be made. In all other cases divorce decrees constitute final adjudications the same as judgments in other kinds of litigation. *Kraft* v. *Kraft*, 193 Iowa 602; *Duvall* v. *Duvall*, 215 Iowa 24.

Three general rules applicable under Section 10481 of the Iowa Code have been laid down by the Iowa Supreme Court. They are (1) where provision has been made in the original decree for the custody of minors or for the continued support and maintenance of the wife, the court retains jurisdiction to modify such provision; (2) where no alimony or maintenance and support is allowed the wife in the original decree, the court has no power subsequently to modify the decree so as to allow the same; (3) where alimony is allowed in a lump sum, or a settlement of property rights made by the parties is ratified by the decree, the court has no power to modify the allowance.

In every case in which the Supreme Court of Iowa has allowed a modification of a divorce decree, the custody and support of minor children were involved

or a provision for continued future payments by the husband for the maintenance of the wife was contained in the original decree and a showing was made that changed conditions warranted the modification. In such cases the court has retained jurisdiction to modify the decree under the statute. *Franklin* v. *Bonner*, 201 Iowa 516; *Wilde* v. *Wilde*, 36 Iowa 319; *Andrews* v. *Andrews*, 15 Iowa 423; *Handsaker* v. *Handsaker*, 223 Iowa 462; *Morrison* v. *Morrison*, 208 Iowa 1384; *Toney* v. *Toney*, 213 Iowa 398; *Boquette* v. *Boquette*, 215 Iowa 990; *Junger* v. *Junger*, 215 Iowa 636; *Nicolls* v. *Nicolls*, 211 Iowa 1193; *Kirk* v. *Kirk*, 222 Iowa 945; *Duvall* v. *Duvall*, 215 Iowa 24.

In *Duvall* v. *Duvall, supra*, one of the more recent Iowa cases, the former wife filed a petition for modification of a divorce decree asking alimony for herself and a monthly allowance for the support of a minor child and also asking an allowance for attorneys' fees. The Supreme Court denied further alimony to the wife but ordered a trial on the amount necessary to support the minor child. There was no question concerning the court's retained jurisdiction to modify with respect to support for the child. However, on the question of modification regarding alimony to the former wife, the court had no retained jurisdiction. As in the case at bar, the parties had made a settlement of the property interests which was recognized in the decree.

In every instance where the decree of divorce failed to provide for alimony the court held that there had been a final adjudication of the property rights and it had lost jurisdiction to make subsequent changes. *Spain* v. *Spain*, 177 Iowa 249; *McCoy* v. *McCoy*, 191 Iowa 973; *Duvall* v. *Duvall, supra*. In *Spain* v.

Spain, *supra*, the wife was granted a divorce and the custody of a minor son. No mention was made of alimony in the decree or support for the child, the wife admitting that at the time of the decree the husband had no means. Subsequently she made application for a modification of the decree on the ground that her former husband's financial condition had improved. The court refused to modify so as to award her alimony, on the ground that there had been a final adjudication.

In *McCoy* v. *McCoy*, *supra*, suit was brought by plaintiff against her former husband, asking a decree for alimony supplementary to her decree of divorce obtained by her in Arkansas, wherein no alimony was allowed. She also prayed an allowance for the support of a minor child of the marriage. Upon motion of the defendant, the allegations of the petition upon which plaintiff predicated her claim for allowance of alimony to herself were stricken. Plaintiff appealed. Decision was affirmed. The court held: "That the severance of the marriage relation by absolute decree without alimony terminates the right to alimony."

There has never been a decision of the Supreme Court of Iowa in which modification of a lump sum award of alimony in a divorce decree has been allowed. Time and again the Iowa Supreme Court has said, "A decree of divorce settles the property rights" (*Carr* v. *Carr*, 185 Iowa 1205); alimony "can only be allowed where the marriage relation exists" (*McCoy* v. *McCoy*, *supra*); and "in this country, and *especially in this state*, a divorce absolutely dissolves the marriage status, and the duty of support no longer exists". *Kraft* v. *Kraft*, *supra*. See also *Spain* v.

Spain, supra; Patton v. *Loughridge*, 49 Iowa 218; *Baird* v. *Connell*, 124 Iowa 278, and other cases cited in these cases. In view of the often repeated pronouncements of the Iowa Supreme Court it may not lightly be assumed as in petitioner's brief, pages 20, 21, that an unqualified power to modify a divorce decree exists in Iowa. Such power is strictly limited under all the Iowa decisions. In *Barish* v. *Barish*, 190 Iowa 493, the Iowa Supreme Court denied modification of a lump sum alimony award. In that case the decree gave the wife $1,500 alimony, care and custody of a minor child and allowance of $20 per month for its support and maintenance. Subsequently she applied for a modification asking an increase in her alimony allowance. The trial court declined to make any modification except to increase the allowance for support of the child to $30 per month. The Supreme Court increased the allowance for support of the child to $50 per month but did not increase the lump sum payment of $1,500. In a separate concurring opinion, Judge Salinger poses the question: "Does our statute give power to modify an allowance of gross or permanent alimony?" After a review of the decisions he concludes that it does not and points out that permanent or gross alimony is different from an allowance for continuing support which may be changed.

The subsequent case of *Kraft* v. *Kraft*, *supra*, confirms *Barish* v. *Barish*, *supra*. On May 20, 1920 defendant filed her third application asking the court to direct plaintiff to pay $548.66, as an increase in alimony and support for herself and the minor son of the parties and for attorneys' fees. After a trial the court granted the order in the amount of one-half of the sums asked, and decreed that said sum

be distributed by paying each one of the persons holding bills one-half of their claims, and provided that the parties holding such bills should receipt in full, so far as any liability of the plaintiff on said accounts was concerned. The order further provided that this was for the support of defendant and the minor son, and was in addition to the amount of alimony awarded in the original cause and the two prior modifications; that this was made necessary by the increased cost of living since the original decree; plaintiff appealed and the Supreme Court reversed.

The original decree awarded the wife $4,000 to be paid within six months or in lieu thereof the husband could elect to pay 5% of said amount, *i. e.*, $200 a year. This he elected to do. It was contended by appellant that, by the original decree, appellee was awarded a lump sum as alimony, and that this amounts to a division of the estate. Appellee contended that the entire amount awarded as alimony, including the $4,000 is for her support. However, the court said at page 607:

> "The effect of the decree was, we think, so far as defendant is concerned, to award her a lump sum out of her husband's estate. We held, in *Spain v. Spain*, 177 Iowa 249, that the court has no inherent power to modify a decree of divorce as regards alimony—no power to so modify, except for such fraud or mistake as would justify a modification or change of any judgment; and *that a decree of divorce silent as to any alimony cannot thereafter be so modified as to provide for alimony*, even though there is a showing of change in financial condition. In the course of the opinion in the *Spain* case, the court said that, at common law, and under

ecclesiastical procedure, courts entertained such an action because there was no such thing as an absolute divorce; that the divorce was from bed and board, and little more than a legalized separation, with the duty of the divorced husband to support his wife after divorce; and further, that, in this country and especially in this state, a divorce absolutely dissolves the marriage status, and the duty of support no longer exists. Alimony is allowed in such cases in lieu of dower and prior duty to support, and there can be no review of the decree awarding it, or refusing, denying, or failing to award it, save for such fraud or mistake as would authorize the setting aside or modification of any decree. * * *.

"We are inclined to the view that, where alimony is allowed in a lump sum, as permanent alimony, or there is a division of the real property of the parties, as permanent alimony, the statute does not authorize a change therein, except for such reasons which would justify the setting aside or changing of a decree in any other case; that the party awarded permanent alimony is not entitled to permanent alimony and support both, as claimed by the defendant in the instant case." (Italics ours.)

The foregoing cases stand unchallenged and they are therefore the law of Iowa. The criticism of the *Kraft* case on pages 22 and 23 of petitioner's brief is unwarranted. An increase of allowance for support of the minor son (p. 606) was denied on the ground that there was "no evidence to show that there had been any material change in conditions". Allowance of any further sum to the wife was denied squarely on the ground that the lump sum award

in the original decree precluded a modification. This was no mere dicta as asserted in petitioner's brief. The decision is in harmony with *Barish* v. *Barish*, and it does not conflict with nor purport to overrule any of the Iowa cases dealing with the modification of divorce decrees. The two prior orders referred to in petitioner's brief (p. 23), were adjudications of the lower court which had not been appealed, and there is therefore no inconsistency in the decision.

In contending that "The Iowa court accepted the trust as marking out the extent of the husband's duty of support" (Brief, p. 8); that "The decree of the Iowa court confirms and embodies the husband's obligation to devote the income * * * to the use of his wife" (Brief, p. 11); that "In adopting the trust, the Iowa court simply ruled in substance that the obligation was coextensive with the terms of the trust" (Brief, p. 13); and that "The only difference between this case and *Douglas* v. *Willcuts*, is the *extent* of the obligation rather than the *existence* of the obligation" (Brief, p. 16), the petitioner ignores the existence of two distinct legal ideas: *First*, a decree of absolute divorce in Iowa terminates the duty of further support, such duty being an incident of the marriage relation. *Second*, the trust here does not create any continuing obligation in lieu of the former duty of support, but it must be found, if at all, (1) in the divorce decree itself, (2) in the laws of the domicile, or (3) in an agreement collateral to the trust. All three of these elements were present in *Douglas* v. *Willcuts*. None of them are present in the instant case.

In *Durall* v. *Durall*, *supra*, the Iowa Supreme Court held that the trial court was without power to modify a divorce decree so as to award a former wife alimony where the parties had settled their property rights without the aid of the court and where such settlement, as in the case at bar, had been approved by the court. The divorce terminated the duty to further support.

In *Carr* v. *Carr*, *supra*, cited by the court below, the court said, with respect to a trust which was embodied in a divorce decree; "Ordinarily a decree of divorce settles the property rights and interest of the parties in the property rights of each other".

In the instant case as in *Durall* v. *Durall*, there was a confirmation in the decree of the settlement made out of court. Furthermore, the settlement was a lump sum settlement, as hereinbefore pointed out and as described by the court below and hence it falls squarely under the decisions of *Barish* v. *Barish*, *supra*, and *Kraft* v. *Kraft*, *supra*. The son Lucius W. Fitch, born March 27, 1906 (R. 19) had attained his majority six years prior to the income tax year 1953, and no question of continuing liability for support of minor children is involved. As the court below correctly concluded, the right to further alimony was absolutely precluded by the decree of divorce which dissolved the marriage status and hence removed the duty or obligation of the respondent further to support his former wife. The property settlement and divorce decree achieved finality and thereafter neither F. W. Fitch nor his former wife Lettie S. Fitch, could claim any property or support from the other, regardless of any change in the circum-

stances or conditions of either. The law of Iowa on the subject as found by the court below and as laid down in the cases is not open to dispute.

Conclusion.

The conclusion must be that the Court below was right; that the various Circuit Courts of Appeals have correctly interpreted the decision in *Douglas v. Willcuts;* that the income of this trust was not applied to discharge any existing liability of the respondent, nor for his benefit; and that it was not his constructively or otherwise.

The judgment should be affirmed.

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APPENDIX.

Provisions of Revenue Act of 1932 Governing the Taxation of Trust Income.

SEC. 161. IMPOSITION OF TAX.

(a) **Application of Tax.**—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including——

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) **Computation and Payment.**—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in Section 166 (relating to revocable trusts) and Section 167 (relating to income for benefit of the grantor). For return made by beneficiary, see Section 142.

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed

in the same manner and on the same basis as in the case of an individual, except that

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by Section 23(n)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in Section 23(n), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under Subsection (c) of this section in the same or any succeeding taxable year;

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income

of the estate or trust the amount of the income of the estate or trust for its taxable year which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

SEC. 166. REVOCABLE TRUSTS.

Where at any time during the taxable year the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.

SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in Section 23(n), relating to the so-called "charitable contribution" deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section, the term "in the discretion of the grantor" means "in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question".

SUPREME COURT OF THE UNITED STATES.

No. 243.—October Term, 1939.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* F. W. Fitch. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[January 29, 1940.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner claimed that an amount of $7,128 distributed in 1933 under a so-called alimony trust to respondent's divorced wife should have been included in respondent's taxable income for that year. The Board of Tax Appeals agreed and found a deficiency (37 B. T. A. 1330). The Circuit Court of Appeals reversed, one judge dissenting, 103 F. (2d) 702. We granted certiorari because of the asserted failure of that court correctly to apply the principle involved in *Douglas* v. *Willcuts*, 296 U. S. 1.

The so-called alimony trust in question was created a few years before the divorce, while respondent and his wife were separated, and in settlement of a suit brought by her for separate maintenance. Certain premises (a hair tonic factory and a long term lease thereon) were transferred to a trustee to hold title, collect rents and after deduction of expenses to pay the wife $600 a month during her life and the balance to respondent for his life.[1] On the death of either respondent or his wife the deceased's share of the income was to be paid to their children.[2] The trust was to continue at least

[1] Respondent and his wife separated in 1917. In 1919 respondent purchased a home for his wife, furnished it for her, and gave her an automobile. In the same year F. W. Fitch Co. was incorporated and acquired the assets of a predecessor partnership in exchange for 2,000 of its shares. Of these shares 1860 were issued to respondent and 10 to his wife. She was also an officer and director of the company, with a monthly salary of $300.

When the separate maintenance suit was settled in 1923, respondent leased certain premises, owned by him, to the F. W. Fitch Co. for 99 years, at an annual rental of $12,000. These premises and that lease were transferred to the trustee. Upon creation of the trust the wife ceased to be an officer and director of F. W. Fitch Co. and received no further salary from it.

[2] No question of minor children is here involved, the youngest of the four children having become of age in 1927.

fifteen years. On the death of both respondent and his wife the principal was to be paid over to their children. The trust was irrevocable. And while respondent covenanted to pay off certain encumbrances on the trust property, he did not underwrite in whole or in part the $600 monthly payments to his wife.

In 1925 she filed suit for a divorce in an Iowa court. A property settlement was agreed upon which included the trust agreement and, in addition, provided for a transfer to her by respondent of certain shares of stock and cash.[3] The divorce decree confirmed the property and alimony settlement.[4]

The general rule is clear. "Amounts paid to a divorced wife under a decree for alimony are not regarded as income of the wife but as paid in discharge of the general obligation to support, which is made specific by the decree". *Douglas* v. *Willcuts, supra*, p. 8. It is plain that there the alimony trust, which was approved by the divorce decree, was merely security for a continuing obligation of the taxpayer to support his divorced wife. That was made evident not only by his agreement to make up any deficiencies in the $15,000 annual sum to be paid her under the trust. It was also confirmed by the power of the Minnesota divorce court subsequently to alter and revise its decree and the provisions made therein for the wife's benefit. Likewise consistent with the use of the alimony trust as a security device was the provision that on death of the divorced wife the corpus of the trust was to be transferred back to the taxpayer. Respondent insists that in the instant case there is no continuing obligation to which the income of the alimony trust is applied but rather that the property and alimony settlement approved by the Iowa court effected an absolute discharge of any duty or obligation on his part to support his divorced wife. It is true that there is no covenant or guarantee to make up any deficiency in the monthly payment to his divorced wife, as there was in the *Douglas* case. And unlike that alimony trust, the instant one, though granting the

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3 600 shares of stock of F. W. Fitch Co. and $23,500.

4 "It is, Therefore, Ordered, Adjudged and Decreed, that the plaintiff, Lettie S. Fitch, be, and she is hereby, divorced from the defendant, Fred W. Fitch, absolutely; . . . that the trust agreement which is referred to in the defendant's answer as having been entered into between these parties on or about the 23rd day of April, 1923 . . . be, and the same is hereby ratified and confirmed by the court; and that the property and alimony settlement made by the parties be, and it is hereby confirmed by the court."

taxpayer a participation in the income, irrevocably alienates the corpus. Other indicia of the use of this alimony trust as a security device for any continuing obligation of respondent are alleged to be absent by reason of the lack of power in the Iowa court to modify the decree confirming the property and alimony settlement.

The Iowa statute provides: "When a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be right. Subsequent changes may be made by it in these respects when circumstances render them expedient."[5]

Admittedly the court under that statute has the power to modify provisions in the original decree for the continued support and maintenance of the wife.[6] And it likewise seems well settled by a long line of Iowa cases that where the original decree makes no provision for alimony, there is no power subsequently to modify the decree so as to provide it.[7] And, respondent contends, where alimony is allowed in a lump sum or a property settlement is ratified by the decree, the court retains no power to modify.

Spain v. *Spain*, 177 Ia. 249, and *McCoy* v. *McCoy*, 191 Ia. 973, on which respondent and the Circuit Court of Appeals place reliance are not in point since those divorce decrees, unlike the instant one, made no provision for alimony. In *Spain* v. *Spain, supra*, the Supreme Court of Iowa specifically reserved the question of the power to modify a divorce decree involving a property settlement. As to that it said (pp. 260-261): "As to an award in gross, or a division of the property, based upon an equitable apportionment of the property of either of the parties at the time the divorce is granted, we have no occasion to speak, for that matter is not in the case."

Likewise *Barish* v. *Barish*, 190 Ia. 493, cited below and urged here in support of respondent's contention, is of little aid, for in spite of a strong concurring opinion that the court had no power to modify an allowance of "gross" or "permanent" alimony, the majority ap-

[5] Sec. 10481, Iowa Code.

[6] See Corl v. Corl, 217 Ia. 812; Junger v. Junger, 215 Ia. 536; Boquette v. Boquette, 215 Ia. 990; Toney v. Toney, 213 Ia. 398; Morrison v. Morrison, 208 Ia. 1384.

[7] Spain v. Spain, 177 Ia. 249; McCoy v. McCoy, 191 Ia. 973; Handsaker v. Handsaker, 223 Ia. 462; Duvall v. Duvall, 215 Ia. 24; Doekson v. Doekson, 202 Ia. 489.

plied the statute and concluded (p. 501) "Whatever the extent of the power of the court may be to make such increase, it is always slow to exercise such power, except in the presence of extraordinary circumstances, such as are not present here." To be sure, there is the following strong statement in *Kraft* v. *Kraft*, 193 Ia. 602, 607: "We are inclined to the view that, where alimony is allowed in a lump sum, as permanent alimony, or where there is a division of the real property of the parties, as permanent alimony, the statute does not authorize a change therein, except for such reasons as would justify the setting aside or changing of a decree in any other case; that the party awarded permanent alimony is not entitled to permanent alimony and support both . . . ." And in *Carr* v. *Carr*, 185 Ia. 1205, that court stated, p. 1211: "Alimony is allowed in lieu of dower and the prior duty of support, and a review of the decree awarding or refusing same can be had only for such fraud or mistake as would authorize the setting aside or modification of any other decree." In that case the divorce decree required the husband, *inter alia*, to convey certain real estate to a trustee for the exclusive benefit of the wife to be held in trust for five years, during which time the income was to be paid over to the wife and at the end thereof the trustee, on demand, was to convey the property to her. Meanwhile, the trustee had the power to sell the property at not less than $100 an acre. Shortly before the expiration of the five-year period, the divorced husband filed a cross-petition in the divorce suit asking for a modification of the trust in order to protect his former wife from her own extravagance and her inexperience in business affairs. Apparently the relief asked was not based on the Iowa statute giving the court power to make subsequent changes in the divorce decree "when circumstances render them expedient". For the court stated that the modification of the decree was sought on the grounds (1) that the donor of the trust was entitled to have it carried out in accordance with its terms and the real purpose for which it was created; and (2) that, in the alternative, he was entitled to have a guardian of the property appointed.

However that may be, much of the weight which respondent accords *Kraft* v. *Kraft* and *Carr* v. *Carr*, *supra*, seems to have been dissipated by *McNary* v. *McNary*, 206 Ia. 942. In that case the Su-

preme Court of Iowa had squarely before it the question of whether or not under the foregoing statute a decree of permanent alimony awarding personal and real property to the wife could be altered. The court after stating that it knew of no case where such a decree had been subsequently modified, added (p. 946): "This question is not argued by the parties, and we find it unnecessary to make a pronouncement thereon." And, significantly, it proceeded to apply the statute and finding that its conditions had not been satisfied, it denied the relief asked by the divorced husband.

On this state of the Iowa authorities we can only speculate as to the power of the Iowa court to modify alimony awarded in a lump sum or a property settlement ratified by a divorce decree. To be sure, *Kraft* v. *Kraft, supra*, involved some features common to the instant case, since the wife was to receive the income of $4,000 to be placed in trust by the husband or, until he placed it in trust, 5 per cent on that amount. But the refusal to modify that decree was not placed squarely, or even largely, on the lack of power to do so but on other circumstances. Furthermore, the uncertainty created by *McNary* v. *McNary, supra*, makes perhaps for even greater uncertainty where an alimony trust of the kind here involved is concerned. At least respondent has not established a necessary identity in treatment of transfers of personal or real property on the one hand and allowance of income out of this kind of alimony trust on the other. Even on the authority of *Kraft* v. *Kraft, supra*, respondent has not clearly shown that in Iowa divorce law the court has lost all jurisdiction to alter or revise the amount of income payable to the wife from an enterprise which has been placed in trust. For all that we know it might retain the power to reallocate the income from that property even though it lacked the power to add to or subtract from the corpus or to tap other sources of income.[8] If it did have such power, then it could be said that a decree approving an alimony trust of the kind here involved merely placed upon the preexisting duty of the husband a particular and specified sanction. In that event, the case would be little different from one where the husband was directed to make specified payments to the divorced wife. And we see no reason why the rule of *Douglas* v. *Willcuts, supra*, should not then apply.

[8] Cf. Shaw v. Shaw, 59 Ill. App. 268.

Enough has been said to show that respondent has not sustained the burden of establishing that his case falls outside the general rule expressed in *Douglas* v. *Willcuts, supra*. If we were to conclude that this case is an exception to that rule we would be acting largely on conjecture as to Iowa law. That we cannot do. For if such a result is to obtain, it must be bottomed on clear and convincing proof, and not on mere inferences and vague conjectures, that local law and the alimony trust have given the divorced husband a full discharge and leave no continuing obligation however contingent. Only in that event can income to the wife from an alimony trust be treated under the revenue acts the same as income accruing from property after a debtor has transferred that property to his creditor in full satisfaction of his obligation—unless of course Congress decides otherwise.

The judgment of the Circuit Court of Appeals is

Reversed.

Mr. Justice REED concurs in the result.

Mr. Justice MCREYNOLDS is of the opinion that the judgment below should be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.